Supreme Court, U.S.
FILED
971611 MAR 27 1998

IN THE SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF THE ESTATE OF
PAUL K. COUSINO, deceased

MACOMB COUNTY PROBATE COURT #86-96297-SE

MICHIGAN COURT OF APPEALS #174253 & 184104

MICHIGAN SUPREME COURT #109145 & 109145

APPENDIX
IN SUPPORT OF PETITION FOR WRIT

SUBMITTED BY:
PAUL W. COUSINO, in propria persona
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ORDER ALLOWING ACCOUNT
Estate of Paul K. Cousino, deceased
Date of hearing: March 23, 1994 Judge: James F. Nowicki
John B. Kiefer Temporary Personal Representative of the estate has filed a petition requesting the allowance of First Annual account
Notice of the hearing was given to or waived by all interested parties.
The petitioner appeared.
It appears to the court after due examination of the account, that the petition is correct and ought to be allowed, including fiduciary and attorney fees.
IT IS ORDERED that the account be allowed.
March 23 1994 JAMES F. NOWICKI
Judge of Probate

ORDER ALLOWING ACCOUNT
Estate of Paul K. Cousino, deceased
Date of hearing: March 1, 1995 Judge: James F. Nowicki
John B. Kiefer, Temporary Personal Representative and Personal Representative of the estate has filed a petition requesting the allowance of Second Annual account.
Notice of hearing was given to or waived by all interested parties.
The petitioner appeared.
It appears to the court, after due examination of the account, that the petition is correct and ought to be allowed, including fiduciary and attorney fees.
IT IS ORDERED that the account be allowed and the Guardian Ad Litem fees be paid.

March 1, 1995 JAMES F. NOWICKI
Judge of Probate

Court of Appeals, State of Michigan
ORDER
In re Estate of Paul K. Cousino, deceased

Docket #174253 & 184104
L.C. #86-96297-SE

David H. Sawyer
Presiding Judge
Clifford W. Taylor
Michael J. Matuzak
Judges

Pursuant to MCR 7.214(E) and 7.216(A)(7), the Court dispenses with oral argument (in Docket No. 184104) and AFFIRMS the March 23, 1994 and March 1, 1995 orders of the Macomb Probate Court in this cause, to the extent authorizing reimbursement from the estate for attorney fees and costs expended by the personal representative in defending his appointment on appeal. Attorney fees incurred by an executor to defend against a petition for his removal are properly chargeable against the estate where no wrongdoing is proved. In re Hammond Estate, 215 Mich App 379, 387 (1996).

A true copy entered and certified by Ella Williams, Chief Clerk, on January 24, 1997 /s/

Court of Appeals, State of Michigan
ORDER
Estate of Paul K. Cousino, deceased
Docket #174253 & 184104
L.C. #86-96297-SE

David H. Sawyer
Presiding Judge
Clifford W. Taylor
Michael J. Matuzak*
Judges

The Court orders that the motion for rehearing is DENIED.

*Circuit judge, sitting on the Court of Appeals by assignment.

A true copy entered and certified by Ella Williams, Chief Clerk, on April 9, 1997 /s/

ORDER Michigan Supreme Court, Lansing, Michigan
Entered: December 30, 1997

109145-6

IN RE ESTATE OF COUSINO, SC: 109145-6
COA: 174253 & 184104
LC: 86-96297-SE

PAUL W. COUSINO,
Appellant

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Taylor, J., not participating.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 30, 1997 /s/

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of the Estate of PAUL K. COUSINO, Deceased.

PAUL W. COUSINO, Contestant-Appellant

v

S. LEE ELLIOTT, Personal Representative of the Estate of PAUL K. COUSINO, Deceased, and LORALEE REKUCKI, Proponents-Appellees

and
HAROLD I. GACH, DAVID GRIEM, DAWN COUSINO, and DALE S. ADAMS, Appellees

PAUL W. COUSINO, Contestant-Appellant

v

ARTHUR J. ROSE, III, Temporary Personal Representative of the Estate of PAUL K. COUSINO, Deceased, and LORALEE
REKUCKI, Proponents-Appellees

and
HAROLD I. GACH, S. LEE ELLIOTT, DAVID GRIEM, DALE S. ADAMS and CHARLES H. EARL, JR, Appellees

PAUL W. COUSINO, Contestant-Appellant

v

LORALEE REKUCKI, Proponent-Appellee

November 14, 1991

Nos 112719, 115406, 115587

No. 118116

No 120943

Before: Neff, PJ, and Gillis and Michael J. Kelly, JJ

These five consolidated appeals involve the Estate of Paul K. Cousino. Contestant Paul W. Cousino, son of the decedent, successfully set aside in a separate action his father's 1985 will on the ground that it was a product of undue influence exerted by the decedent's daughter. and the contestant's sister, Loralee Rekucki. Consequently, the decedent's 1978 will was admitted to probate. That will is the subject of the instant action.

The 1978 will nominated contestant to be the personal representative of the Paul K. Cousino Estate. Rekucki, however, objected to the appointment on the basis that the animosity between the contestant and herself would interfere with the proper administration of the estate. The probate court agreed and appointed a third party, S. Lee Elliott, as personal representative. The contestant appealed the appointment and Elliott was then made the temporary personal representative of the estate, pending outcome of the appeal. Contestant again objected to the temporary appointment, claiming that Elliott had a conflict of interest because he was an associate of Rekucki's counsel in this matter. The trial court this time stayed the order appointing Elliott as temporary personal representative and in his place appointed Arthur J.Rose III.

The probate court also entertained various motions regarding the granting of attorney fees and the rental of estate property. From the lower court's rulings concerning appointment of the personal representative as well as from the holdings on the motions regarding attorney fees and administration of the will, contestant appeals as of right. The appeals have been consolidated by this Court.

I

The first issue presented is whether the probate court abused its discretion in failing to appoint contestant as a personal representative of the estate, and in failing to accept certain evidence during the hearing on this matter.

The question of whether a personal representative should be removed is one entrusted to the discretion of the probate court. In re Humphrey Estate, 141 Mich App 412, 423; 367 NW2d 873 (1985). In this case the probate court found that contestant and Rekucki, the two primary beneficiaries of the will, were unable to agree or cooperate

regarding the disposition of the estate, and that their animosity would interfere with the contestant's ability to properly administer the estate. The record before this Court supports the probate court's finding, and in light of the inability of contestant and Rekucki to move forward without constant bickering and objection, we find no abuse of discretion in the court's appointment of a third party to represent the estate.

Neither do we find error in the court's failure to hold an evidentiary hearing concerning contestant's suitability to serv e as the estate's personal representative. A hearing was held on the petition for appointment of the personal representative. The parties gave oral argument and, as we have found above, the court within its discretion found contestant unsuitable to serve as personal representative of the estate. Contestant relies on MCL 700.164; MSA 27.51264 and MCL 700.172; MSA 27.5172 for the proposition that he is entitled to a hearing at which he would have the opportunity to submit evidence. We find no such requirement mandated by these statutes. Furthermore, contestant fails to allege any evidence that would be relevant to the issue at hand.

II

The next issue is whether the trial court erred in appointing Elliott as the personal representative of the estate.

Contestant was not appointed personal representative of the estate, although nominated by the will, because the animosity between himself and Rekucki would have interfered with the administration of the estate. To ensure an expedient disposition of the estate, the court indicated that it would appoint an independent, third party personal representative if the parties could not agree on such a representative. When the parties could not reach an agreement, the court on October 6, 1988, appointed Elliott. On March 13, 1989, Jerald R. Lovell, of counsel to Elliott's law firm, substituted for Charles H. Earl, Jr. as Rekucki's counsel on several matters involving the estate. Thus, although no conflict existed at the time Elliott was appointed personal representative, a potential or apparent conflict has since arisen. Accordingly, we agree with contestant that Elliott is not a suitable independent, third party personal representative. This Court has found nothing improper in either

Elliott's or Rose's administration of the estate, but in light of the fact that the contestant was not appointed to represent the estate in favor of someone who was to be a disinterested, third-party personal representative, that appointment should go to a representative without ties to either party in order to avoid the appearance of partiality and to expedite the closing of this troubled estate. We direct the probate court to appoint a personal representative who is unaffiliated and independent of the parties to this litigation.

We reject as meritless contestant's assertion that Eliott bear the cost of the bond which he was required to secure when appointed personal representative of the estate.

III

Contestant also raises a claim that the probate court erred in declining jurisdiction over nonprobate assets allegedly converted from the estate by Rekucki. We find no error. A claim of wrongful conversion must be brought by the personal representative of the estate. MCL 700.171; MSA 27.5171. A personal representative's role in bringing an action for conversion exemplifies the need in this case for a disinterested personal representative.

IV

The last issue raised by contestant concerns the probate court's disposition regarding attorney fees.

First, we find no merit in contestant's argument that the court abused its discretion in ordering the estate to pay the attorney fees incurred by Rekucki to defend the 1985 will which was eventually set aside. The person nominated by a will as personal representative may, upon approval of the court, retain counsel for the purpose of sustaining the will. MCL 790.148; MSA 27.5148; se also In re Sarras Estate, 148 Mich App 171; 384 NW2d 119 (1986).

Next, we disagree with contestant's assertion that the probate court abused its discretion in granting attorney fees to Rose, as temporary personal representative, for services performed in connection with the petition to rent estate property. Rose's proposal regarding the property was made in the interest of the estate, notwithstanding any derivative benefits gained by Rekucki. The trial court did not abuse its discretion.

We do, however, agree with contestant that the court abused its discretion in denying attorney fees for contestant's successful challenge of the 1985 will. Attorney fees are

chargeable to the estate when the services rendered were beneficial to the estate as a whole rather than to an individual or a group of individuals interested therein. Becht v. Miller, 279 Mich 629; 273 NW 294 (1937); In re Valentino Estate, 128 Mich App 87, 96; 339 NWW 2d 698 (1983). We conclude that it is beneficial to the estate as a whole to strike a will which has been obtained under undue influence and therefore against the inclination and volition of the testator. To find otherwise would be to disparage the policy of distributing the estate according to the decedent's true intent. The attorney fees incurred by contestant in challenging the 1985 will are chargeable to the estate.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/

STATE OF MICHIGAN
COURT OF APPEALS

In the matter of PAUL K. COUSINO, deceased

JOHN B. KIEFER, Temporary Personal Representative of the Estate of PAUL K. COUSINO, Deceased, Petitioner-Appellee

v

PAUL W. COUSINO, Respondent-Appellant

October 10, 1997

Nos. 194005; 194118
Macomb Probate Court
LC No. 89-96297-SE

Before: Smolenski,PJ and Fitzgerald and Gage, JJ

PER CURIAM

In Docket No. 194005, respondent appeals a probate court order authorizing petitioner to list and sell the real estate and a mobile home owned by the estate. In Docket No. 194889, respondent appeals as of right from two orders entered by the probate court: an order allowing petitioner's third annual account and an order imposing sanctions in the amount of $63,232 against respondent for vexatious proceedings, the reasonable expenses incurred, including fiduciary and attorney fees, and $500 in costs for an unpaid sanction imposed in a previous appeal.

We affirm the orders allowing the account and authorizing petitioner to list and sell the real estate. We also affirm the order imposing sanctions to the extent that those sanctions include expenses for frivolous claims filed in the probate court pursuant to MCR 2.114(F). To the extent that the order included sanctions for vexatious appeals before this Court, we note that the probate court lacked authority to impose sanctions. However, this Court, possessing such authority, sanctions respondent pursuant to MCR 7.216(C)(1) for vexatious appeals and proceedings in this Court and remands pursuant to MCR 7.215(C)(2) for a determination of actual and punitive damages.

This case concerns the estate of respondent's father, Paul K. Cousino. Respondent and his sister are the two principal beneficiaries of the estate. The petition for commencement of probate proceedings was filed on July 7, 1986. However, because of numerous objections and appeals filed by respondent, the case has not yet been concluded.

Petitioner was appointed as personal representative in October 1992 and temporary personal representative in April 1993. In February 196, petitioner filed petitions with the probate court seeking authorization to list and sell the real estate, allowance of the third account, and sanctions against respondent for filing frivolous appeals. The probate court granted the petitions.

This Court reviews the actions of the probate court for an abuse of discretion. In re Rice Estate, 138 Mich App 261, 270; 360 NW2d 587 (1984). Because a trial court's decision to award sanctions pursuant to MCR 2.114 involves findings of fact, this Court reviews the trial court's ruling to determine whether it was clearly erroneous. Contel Systems v. Gores, 183 Mich App 706, 711; 455 NW2d 398 (1990).

Respondent first argues that petitioner cannot recover his fees because an executor cannot be paid from the estate for following a case to higher courts. MCL 700.543; MSA 27.5543 enables a fiduciary of an estate to employ an attorney to perform legal services on behalf of the estate and provides that the attorney shall receive reasonable compensation for those services. To be chargeable to the estate, the services must have been beneficial to and on behalf of the estate. In re Valentino, 128 Mich App 87, 94 - 95; 339 NW2d 698 (1983). For example, this Court has allowed an executor to recover from the estate fees incurred in defending his position as executor, provided that there was no wrongdoing on the part of the executor. In re Hammond Estate, 215 Mich App 379, 387; 547 NW2d 36 (1996); In re Humphrey Estate, 141 Mich App 412, 441; 367 NW2d 873 (1985). Therefore, the probate court did not abuse its discretion in allowing petitioner's third annual account, including fiduciary and attorney fees for services rendered while defending his position as personal representative.

This Court has also concluded that MCL 700.543; MSA 27.5543 does not allow the estate to pay attorney fees incurred in defending a petition for attorney fees. In re Sloan Estate, 212 Mich App 357, 360 - 361; 538 NW2d 47 (1995). These "fees for fees" claims are normally not recoverable because they do not benefit the estate by increasing or preserving the estate's assets. Id at 363. However, this Court also noted that the probate court may be authorized to award these costs in exceptional circumstances:

> Nonetheless, where extraordinary fees and costs are incurred because of an opposing party's frau d, unjustified objections raised in bad faith, or other extraordinary circumstance, the probate court is authorized to impose appropriate sanctions via various fee-shifting mechanisms. See, e.g., MCR 5.114; MCR 2.114(B)-(F). [Id at 363, n2.]

We conclude that the present case presents extraordinary circumstances in which it is appropriate to award fees and costs as a sanction against respondent pursuant to MCR 2.114(F). Respondent's actions in this case have turned a straightforward matter into a proceeding which has lasted more than ten years. Respondent has appealed almost every order entered by the probate court during that period, filing some eleven appeals in this Court alone. MCR 2.114(F)

allows the court to impose sanctions for frivolous claims. Costs awarded may include court costs and reasonable attorney fees. MCL 600.2591(2); MSA 27A.2591(2). Therefore, we conclude that while fees for fees are not recoverable under MCL 700.543; MSA 27.5543, the probate court neither abused its discretion nor clearly erred in imposing sanctions against respondent for frivolous claims filed in probate court.

However, the probate court did not have authority to impose sanctions for vexatious appeals pursuant to MCR 7.216(C)(1). That authority lies with this Court. We find that the appeals filed by respondent have been taken to delay the closing of the estate without any reasonable basis for believing a meritorious issue was involved and were grossly lacking in the requirements of propriety. Therefore, this Court sanctions respondent for the reasonable expenses incurred by respondent's vexatious appeals. Pursuant to MCR 7.216(C)(2), we remand to the probate court to determine actual costs incurred by the estate, including reasonable attorney fees. We also award punitive damages in an added amount equaling the amount of actual damages.

Respondent also argues that the probate court could not authorize the sale of the real estate. First, respondent suggests that authorizing the sale after respondent and his sister failed to reach an agreement concerning the disposition of the real estate impinged on his right to appeal. Hoever, authority cited by respondent does not support this position, and we conclude the argument is without merit. This Court will not search for authority to support or reject a party's position. Hover v. Chrysler Corp. 209 Mich App 314, 319; 530 NW2d 96 (1995).

Second, respondent contends that by authorizing the sale, the probate court is, in essence, rewriting the will to reflect the intent of the court instead of that of the testator. We disagree. The language contained in the will indicated only a desire to keep the real estate in the family for as along as practicable. It did not create a command that the real estate must never be sold. See In re Stuart's Estate, 274 Mich 282, 285; 264 NW 372 (1936) (language indicating a desire that something be done is precatory language). Petitioner presented sufficient evidence to the probate court that maintaining the real estate has cost the estate approximately $8,300 annually. Therefore, we conclude that the probate court did not abuse its discretion in authorizing

petitioner to list and sell the real estate.

Affirmed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/

Amendment 14, section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 USC 1257(a)

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."